Supreme Court, U.S.
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In The
Supreme Court of the United States

TERRI-ANN TAMARA RAMTULLA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Court of Appeals for the Fourth Circuit has jurisdiction to review substantial constitutional challenges under 8 U.S.C. § 1252(a)(2)(C).

(a) Whether the equal protection claims of this Petitioner presents such a substantial constitutional issue that permits review by the Court of Appeals for the Fourth Circuit.

(b) Whether the Due Process Clause of the Fifth Amendment of the United States Constitution requires judicial determination of substantial constitutional challenges to the Immigration and Nationality Act.

(c) Whether Article III, Section 1 of the United States Constitution requires judicial scrutiny of substantial constitutional challenges to the Immigration and Nationality Act.

(2) Whether Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (h), violates the Equal Protection Clause of the Fifth Amendment of the United States Constitution by making discretionary waivers of removal available to aliens seeking admission or adjustment of status, but not available to aliens who are already lawful permanent residents of the United States.

PARTIES TO THE PROCEEDING

No parent or publicly held company is a party to this proceeding.

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OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals is published in 301 F.3d 202 (2002). The Board of Immigration Appeals did not publish an opinion in this case. Its pertinent rulings from the bench are reprinted in the Appendix at page 6-15.

JURISDICTIONAL STATEMENT

The Fourth Circuit filed its decision on October 28, 2002, and entered an order denying petitioner's Petition for Panel Rehearing of an Order of the Board of Immigration Appeals. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

Immigration and Naturalization Act Section 212(h), 8 U.S.C. § 1182(h)

> The Attorney General may, in his discretion, waive the application of [various sections pertaining to various grounds of inadmissibility if certain conditions are met]. . .No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if. . .since the date of such admission the alien has been convicted of an aggravated felony. . .

Immigration and Nationality Act Section 242, 8 U.S.C. § 1252(a)(1)

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235 (b)(1)) is governed only by chapter 158 of title 28 of the United States Code, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

STATEMENT OF THE CASE

On June 23, 1997, Mrs. Ramtulla entered a plea of guilty to, and was convicted of violating the Code of Virginia §18.2-103, Concealment of Merchandise. (A.R. at 171-172.) Based on this conviction, the Immigration and Naturalization Service (INS) initiated proceedings to deport the Appellant, contending that her conviction constituted a crime involving moral turpitude and aggravated felony under Section 101(a) (43) (G) of the INA. (A.R. at 180.) The Immigration Court of Baltimore, Maryland found that Petitioner had been convicted of an aggravated felony and denied her motion for an INA Section 212 (h) waiver of deportation, ruling that such relief was only available for illegal aliens. Finding that Petitioner was not eligible for any other relief in the United States, the Court ordered her removed and deported from the United States to Jamaica. (A.R. at 38.) Petitioner filed an appeal to the Board of Immigration Appeals (BIA), which denied the appeal and ordered her deported. (A.R. at 2.) She subsequently appealed the BIA decision to the United States District Court for the District of Maryland, which transferred the case to the United States Court of Appeals for the Fourth Circuit pursuant to Section 242 (b) (9) of the INA. The Court of Appeals issued its decision on August 22, 2002,

dismissing the appeal, stating that the Court of Appeals lacks jurisdiction to review the equal protection issue. Petitioner filed a Petition for Panel Rehearing with the Court of Appeals, which was denied by order dated October 28, 2002.

STATEMENT OF THE FACTS

Terri-Ann Tamara Ramtulla is a native of Jamaica who first entered the United States at Miami, Florida as a visitor on December 14, 1992 at the age of 16. She applied for and was granted Lawful Permanent Resident status on August 22, 1995. (A.R. at 223.) Mrs. Ramtulla's parents are also Lawful Permanent Residents. Her husband and two children are native U.S. citizens.

In June 1997, Mrs. Ramtulla entered a plea of guilty, and based thereon, was convicted of violating the Code of Virginia § 18.2-103, Concealment of Merchandise. (A.R. at 159.) Imposition of sentence was suspended and she was placed on probation for a period of two (2) years. (A.R. at 171-172.) Mrs. Ramtulla entered the guilty plea to avoid going to jail and did not understand, nor was she informed about the consequences this plea could bear on her immigration status. Mrs. Ramtulla stated that she was merely riding in a car where stolen objects were found and would have elected a jury trial if she had known of the dire immigration consequences of the guilty plea. Based upon the advice of her attorney, she understood the guilty plea as a judicial ploy to avoid being incarcerated, rather than an admission of guilt. Mrs. Ramtulla and her mother specifically asked her attorney about the effects a guilty plea would have on her immigration status and were erroneously advised that it would not have any impact. (A.R. at 174-175.) Mrs. Ramtulla completed her probation without incident, was commended for her good behavior and had her probation period reduced. Except for this one

unfortunate incident, Mrs. Ramtulla has no other blemishes on her record and has been a model citizen, wife, and mother.

Now twenty-five years old, Mrs. Ramtulla has established a stable family life in this country. Following her successful graduation from high school in 1994, Mrs. Ramtulla took courses at the University of the District of Columbia and ultimately pursued studies to become a hair stylist. She is happily married to a native U.S. citizen and has two small U.S. born daughters. (A.R. at 108-112.) Both Mrs. Ramtulla and her three-year old daughter suffer from a serious congenital heart ailment, ventricular septal defect, which requires constant monitoring by both her doctors and her family. (A.R. at 181-212.)

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD DETERMINE WHETHER A FEDERAL COURT OF APPEALS HAS JURISDICTION TO REVIEW SUBSTANTIAL CONSTITUTIONAL CHALLENGES TO THE IMMIGRATION AND NATIONALITY ACT.

A. This Court should resolve the split among the circuits as to whether courts of appeals have jurisdiction to review substantial constitutional challenges to the Immigration and Nationality Act.

This Court declined to decide whether courts of appeals might have jurisdiction on direct review to review substantial constitutional challenges to the INA. *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2, 121 S.Ct. 2268, 150 L.Ed. 2d 392 (2001). This has caused some amount of confusion among the circuits, which are now split on

whether congress intended federal circuit courts to have direct review of substantial constitutional claims, appellate review of substantial constitutional claims, or no review of substantial constitutional claims. The eighth circuit recognized the right to review substantial constitutional challenges to the INA. *Vasquez-Velezmoro v. INS*, 281 F.3d 693 (8th Cir. 2002). Likewise, the seventh circuit has held that an alien "may challenge his deportability on constitutional grounds directly in the courts of appeals, provided that he raises a substantial constitutional claim." *Lara-Ruiz v. INS*, 241 F.3d 934, 939 (7th Cir. 2001). See also, *Morales-Ramirez v. Reno*, 209 F.3d 977 980 (7th Cir. 1999); *LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998). The first circuit has likewise recognized that courts have jurisdiction to review pure issues of law, even when Congress has intended to narrow the scope of review of discretionary decisions by the administrative agencies. *Goncalves v. Reno*, 114 F.3d 110 (1st Cir. 1998). While some of the circuits have ruled that, even if direct review is unavailable in the court of appeals, habeas relief alleviates any constitutional defects, *Jean-Baptiste v. Reno*, 144 F.3d 212, 218 (2d Cir. 1998), *Cutney v. INS*, 178 F.3d 190 (3d Cir. 1999), the seventh and eleventh circuits have held conversely that habeas relief is no longer available to criminal aliens facing deportation, but that IIRIRA places exclusive judicial review in the court of appeals after a final administrative agency order. *LaGuerre*, 164 F.3d at 1040, *Richardson v. Reno*, 162 F.3d 1338, 1344 (11th Cir. 1998). Even within a particular circuit, there is sometimes confusion regarding this issue. For example, the second circuit held that elimination of jurisdiction for direct review of constitutional claims "passes constitutional muster" because such claims can be reviewed on habeas. *Jean-Baptiste*,144 F.3d 212 at 218. On the other hand, the second circuit later claimed jurisdiction on direct review to decide substantial constitutional claims. *Lake v. Ashcroft*, 43 Fed.Apx. 417 (2d Cir. 2002). What is clear is that there is an open question left by *Calcano-Martinez*, supra, with respect

to jurisdiction over constitutional claims, as recognized by the second circuit in *Mugalli v. Ashcroft*, 258 F.3d 42, 51 n.11 (2d. Cir. 2001).

B. This Court Should Determine Whether the Equal Protection Claim Challenging the Constitutionality of Section 212(h) of the Immigration and Nationality Act Presents a Substantial Constitutional Challenge.

Petitioners submit that IIRIRA can be construed to preserve review in the court of appeals of petitioner's statutory and constitutional claims. As the government conceded in its brief and at oral argument, Section 1252 (a)(2)(C) clearly permits appellate review of substantial constitutional claims under the INA. A violation of the Equal Protection under the Due Process clause clearly satisfies the criteria of "substantial." The seventh, eighth and eleventh circuits each have held that the equal protection claim presented by § 212(h) is not a substantial constitutional claim. *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001). *Lukowsky v. INS*, 279 F.3d 644, 647-48 (8th Cir. 2002), *Moore v. Ashcroft*, 251 F.3d 919, 924-27 (11th Cir. 2001). Despite this characterization, this is an issue that has been presented numerous times to various district courts, among which there is a conflict. *Song v. INS*, 82 F.Supp.2d 1121 (2000)) (holding that INA § 212(h) violates equal protection), *Roman v. Ashcroft*, 181 F. Supp. 2d 808 (2002) (same), *Taveras-Lopez v. Reno*, 127 F.Supp.2d 598 (2000)(distinguishing *Song v. INS*). *Guerra v. Ashcroft*, 2002 U.S. Dist.LEXIS 2471 (2002) (magistrate judge recommending that INA §212(h) equal protection claims be dismissed). The second and ninth circuit courts, upon hearing this issue on appeal from the district courts, have held that INA § 212(h) does not violate the equal protection rights of an alien who has been granted permanent resident status. *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002). *Finau v.* INS, 277 F.3d 1146 (9th Cir.

2002). The circuit courts cannot on one hand contend that this issue does not present a substantial constitutional claim, and on the other hand entertain the issue at great length on appeal, and finally reverse the decision of the district courts. As the seventh circuit pointed out, if congress's purpose in precluding direct review by the circuit courts is, "to speed up judicial review of deportation orders directed against disfavored classes of criminals," *LaGuerre v. Reno*, 164 F.3d 1035, 1039 (7th Cir. 1998), then it does not follow that aliens should then have two bites at the apple, rather than one, by pursuing their claim in district court, then being able to appeal it to the circuit court, rather than only having the avenue of direct review by the circuit court. On the other hand, if the circuit courts find that the equal protection claim is not a substantial constitutional claim and thus refuse to review the claim, aliens must present their claim to the district court and appeal it to the circuit court, again circumventing congress's intent to speed up judicial review.

C. This Court should Determine Whether Due Process Requires Judicial Determination of Petitioner's Constitutional and Statutory Claims.

IIRIRA would independently violate the Due Process Clause of the Fifth Amendment if it forecloses appellate judicial scrutiny of petitioners' constitutional or statutory claims. Deportation implicates fundamental interests "basic to human liberty and happiness," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950), and thus, this Court has long held that deportation must comport with the procedural protections mandated by due process. See *Galvan v. Press*, 347 U.S. 522, 531 (1954). As this Court repeatedly has recognized, the "stakes are indeed high and momentous for the alien who has acquired his residence here," *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), and are particularly "weighty" where, as here, the aliens are long-time legal

permanent residents who stand to "lose the right to . . . [live with their] immediate family, a right that ranks high among the interests of the individual." *Landon v. Plasencia,* 459 U.S. 21, 34 (1982); see also *Bridges v. Wixon,* 326 U.S. 135, 154 (1945) (noting that "deportation . . . visits a great hardship on the individual" and that the "liberty of an individual is at stake").

Traditional common law procedural protections provide a critical benchmark in determining whether due process has been violated. While "all deviations from established [common law] procedures" do not result in "constitutional infirmity," the abandonment of well-established safeguards of common law procedure "raises a presumption" that due process has been violated. *Honda Motor Co. v. Oberg,* 512 U.S. 415, 430-31 (1994). Indeed, this Court has noted that the "basic procedural protections of the common law" have rarely been abandoned in our constitutional history. *Id.* at 430.

In *Honda,* for example, this Court held that eliminating judicial review over the size of jury punitive damage awards violated procedural due process because judicial oversight of jury awards was part of a longstanding "common law practice." *Id.* at 421. This Court noted that the presumption in favor of common law procedural safeguards is particularly strong where, as here, "the absent procedures would have provided protection against arbitrary and inaccurate adjudication." *Id.* at 430. Under such circumstances, this Court "has not hesitated to find the proceedings violative of due process." *Id.*

As in *Honda,* the circumstances here involve long-standing practice. Administrative deportation orders have historically been subject to judicial scrutiny to test their constitutionality and legality. No contrary tradition or practice has ever existed in this country. Individuals subject

to deportation by an administrative official have always had recourse to judicial scrutiny of the legality of the administrative order.

More generally, where an administrative agency has been vested with the power to deprive an individual of liberty (or traditional property rights), judicial process has been available as a necessary safeguard. Liberty "cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of . . . imprisonment." *Interstate Commerce Comm'n v. Brimson,* 154 U.S. 447, 485 (1894) (affirming power of ICC to compel documents but noting as axiomatic that contempt powers could not extend to ordering imprisonment without any judicial process). *See Superintendent v. Hill,* 472 U.S. 445, 449-50 (1985) (emphasizing that, even in the prison setting, "difficult" due process questions would be raised by the denial of judicial review over an administrative board's decision to deny a prisoner liberty in the form of "good time" credits); *Rodriguez-Roman v. INS,* 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring) (stressing the "importance of independent judicial review" in immigration "area where administrative decisions can mean the difference between freedom and oppression"). *Cf. Chicago, Milwaukee, and St. Paul Ry. Co. v. Minnesota,* 134 U.S. 418, 458 (1890) (due process violated where "the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery"); *Phillips v. Commissioner,* 283 U.S. 589, 595-97 (1931) (judicial review required for federal statutory tax claim); *South Carolina v. Regan,* 465 U.S. 367, 393 (1984) (O'Connor, J., concurring) (noting "the established rule" that due process requires judicial review of tax assessment claims). *See* Henry P.

Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 15-16 (1983) (historically, "judicial control . . . [has been] at its maximum when coercive governmental conduct was involved"); *See also* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1390 (1953) (stating that "the courts [have] a responsibility to see that statutory authority was not transgressed" in coercive enforcement context).

The government cannot contend that the danger of arbitrary deprivations of liberty in the immigration area "has in any way subsided over time," *Honda*, 512 U.S. at 432, and thus, that it is unnecessary to provide "a reasonable substitute for" judicial oversight, *id.* at 436 (Scalia, J., concurring). Moreover, permitting review of claims will not sanction case-specific review of factual and discretionary determinations that have no systemic impact on the implementation of the Nation's immigration laws. It will, however, permit the courts to ensure that the agency remains within the parameters of its delegated legal authority. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied.").

D. This Court Should Determine Whether Article III, United States Constitution Requires Judicial Scrutiny of Petitioners' Claims.

Article III, § 1 provides that the federal judicial power shall be vested in judges with tenure and salary protection. This Court has not read the language of Article III literally and has permitted significant federal adjudication to be conducted by administrative agencies. However, this Court has also made clear that Article III

protects values that are fundamental to the constitutional plan and imposes critical limits on the use of non-Article III federal adjudicative bodies. See generally *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 847-48 (1986). In particular, this Court has noted that Article III "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government," thereby protecting both structural and individual interests. *Schor,* 478 U.S. at 848.

Typically, this Court's jurisprudence in this area has focused on whether Article III prohibits Congress from placing the initial adjudication of certain disputes in an administrative agency, and has generally upheld such schemes. See *Schor,* 478 U.S. at 852; *Thomas v. Union Carbide Agric. Prod. Co.,* 473 U.S. 568, 592 (1985). But see *Northern Pipeline Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982). In these cases, however, appellate review has remained available as an ultimate safeguard, and the Article III question was not whether all judicial review could be repealed at any stage. See *Schor,* 478 U.S. at 853 (stressing that "the legal rulings of the CFTC . . . are subject to de novo [appellate] review"); *Northern Pipeline,* 458 U.S. at 115 (White, J., dissenting) ("The presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers").

Here, the panel contends that IIRIRA should be construed to preclude all but habeas review over petitioners' claim. Such a reading of IIRIRA fails to preserve the "essential attributes of judicial power" in the courts, one of the factors stressed in the Court' s Article III cases. *Schor,* 478 U.S. at 851. Furthermore, the issues raised by petitioner are substantial constitutional claims regarding equal protection. Review of such claims implicates the core,

traditional role of the courts as the ultimate check against ongoing violations of the law. See *Chadha v. INS*, 634 F.2d 408, 431 & n.32 (9th Cir. 1980) (Kennedy, J.) (noting that review of statutory criteria applied by administrative officials is an "essential judicial function" and emphasizing that courts provide an indispensable "structural check on the Executive"), *aff'd*, 462 U.S. 919 (1983).

Moreover, the preclusion of appellate review in this case is especially problematic because, unlike in other contexts, the issues that would be insulated from all judicial scrutiny are not politically dry issues that have been left to an independent agency with expertise over a narrow area of specialization. In *Schor*, for example, not only was appellate review preserved, but the issues there (relating to commodities trading) were ones that Congress could plausibly have assumed would be "relatively free from political pressures." 478 U.S. at 855; *see also id.* at 836 (noting that Congress believed that agency's technical work was in an area that is unlikely to attract the "political winds that sweep Washington") (quoting House Report); *Northern Pipeline, 458 U.S. at 115* (White, J., dissenting) (noting diminished threat to separation of powers where Article I courts adjudicate issues of "little interest to the political branches").

The Attorney General is subject to acute political and public pressure as the official responsible for implementation and enforcement of the immigration laws. Yet this Court's dismissal of Mrs. Ramtulla's claim would confer on the Justice Department the unilateral and unreviewable power to determine the statutory limits on its own enforcement authority. With so much at stake for legal residents facing deportation from the country (including the consequences for U.S. citizen family members), there must be an independent judicial check to ensure that the power of deportation is exercised within the limits set by law. See

generally Alexander Hamilton, *The Federalist No. 78* 466 (Clinton Rossiter ed., 1961) ("there is no liberty if the power of judging be not separated from the legislative and executive powers") (quoting Montesquieu); *United States v. Will*, 449 U.S. 200, 219 (1980) (absence of independent judges was "one of the evils that had brought on the Revolution and separation").

Congress may of course choose to give an agency responsibility for both enforcement and adjudication. But the Court has never permitted the commingling of enforcement and adjudication in one agency without any judicial review of systemic legal challenges directly affecting an individual's liberty. Compare *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195 (1910) (rejecting due process challenge to commingled procedure, but noting that judicial review always remained to ensure that "executive officers conform their action to the mode prescribed by Congress"). As the Court explained in *INS v. Chadha*, 462 U.S. 919, 951 (1983), another case involving immigration relief provisions, "the hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."

The Framers unquestionably viewed an independent judiciary as an indispensable feature of a Nation premised on the rule of law, where every individual and group could be assured an impartial assessment of their rights. As Hamilton argued in *The Federalist No. 78*, leaving the judiciary without insulation from the political branches would "be fatal to their necessary independence," thus undermining the requirement "that nothing would be consulted but the Constitution and the laws." *The Federalist No. 78*, supra, at 471. Nowhere is the need for independent scrutiny more acutely implicated than in this case, where the personal interests are of profound importance, the issues touch on powerful political and public passions, and the

government's proposed construction of IIRIRA would eliminate appropriate appellate judicial oversight over the Attorney General's interpretation of his statutory authority.

II. THIS COURT SHOULD DETERMINE WHETHER SECTION 212 (h), IMMIGRATION AND NATURALIZATION ACT (INA), VIOLATES APPELLANT'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Immigration Statutes Warrant Deferential Standard of Review, But Must Satisfy Constitutional Rational Basis Review Standard for Equal Protection Claims.

This Court has repeatedly recognized Congress' practically unfettered power to decide which aliens may come to and remain in this country. *Fiallo v. Bell*, 430 U.S. 787 (1977) (holding that, "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."). For this reason, this Court reviews immigration statutes with a strong presumption that the statutes are valid, and should sustain legislative distinctions so long as they are based upon a "facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794 (1977). Moreover, this Court must uphold a distinction drawn by Congress in the immigration realm so long as there is a rational basis for the Congressional decision, whether the rational basis is articulated by Congress or not. *Runnett v. Shultz*, 901 F.2d 782, 787 (9th Cir. 1990).

Congress' plenary-like power over immigration is, however, limited by the principal articulated in *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994) that, "all individuals in the United States - citizens and aliens alike - are protected by the Due Process Clause of the Constitution . . . [which] incorporates the guarantees of equal protection." Although

not required to treat all aliens alike, Congress must have legitimate reasons for treating them differently. *Rodriguez v. INS*, 9 F.3d 408 at 414 (5th Cir. 1993) (citing *Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977).

B. Section 212 (h) of the INA Allows Consideration for Relief from Deportation to Illegal Aliens, While Denying Relief to Lawful Permanent Resident Aliens.

INA § 212 (h), as promulgated by the 1996 amendment to the Immigration and Naturalization Act, with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), allows the Attorney General the discretion to grant relief from deportation if the alien shows that his or her deportation would cause "extreme hardship" to a spouse, parent or child who permanently resides in this country. 8 U.S.C § 1182 (h) (1) (B). INA § 212 (h), however, precludes consideration for this relief "in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence, if the alien has been convicted of an aggravated felony." 8 U.S.C § 1182(h) (2). Specifically, Section 212 (h) states:

> [I]n the case of an immigrant who is the spouse, parent, son or daughter of . . . an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to . . . lawfully resident spouse, parent, son, or daughter of such alien; . . . No waiver shall be granted under this subsection in the case of an alien who has previously been admitted for permanent residence if . . . since the date of admission the alien has been convicted of an aggravated felony . . .

In a pair of cases, the BIA has concluded that the plain language of INA § 212 (h) bars consideration for aliens legally admitted, but that it allows consideration of relief for residents who entered the country illegally. Compare *In Re Michel*, BIA Int. Dec. 3335 (1998) (holding that 212 (h) relief was available for illegal immigrants). *In Re Avala-Arevalo*, BIA Int. Dec. 3371 (1998) (holding that notwithstanding *In Re Michel*, no consideration could be given to INA § 212 (h) claim by legal immigrant).

C. Denial of Section 212 (h) Consideration for Relief from Deportation Irrationally Discriminates Between Legal and Illegal Aliens, and Violates Appellants Right to Equal Protection Under the Fifth Amendment to the U.S. Constitution.

Mrs. Ramtulla's physician, husband, and mother were all prepared to offer testimony as to the hardship that her deportation would impose on the family if she were deported from the United States. However, the INS, the Immigration Judge, and the Board of Immigration Appeals (BIA) denied her the opportunity to file an application or offer testimony on an application for such relief. This pretermission of all forms of relief for Mrs. Ramtulla, otherwise available to illegal immigrants, clearly violated her right to equal protection under the Fifth Amendment to the United States Constitution. Appellant challenges this distinction as making an irrational and illegitimate distinction between individuals in favor of illegal immigrants and therefore violating equal protection.

Equal protection requires that different classifications of persons must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Yeung v. INS*, 76 F.3d 337, 338 (11th Cir. 1995). See also

Francis v. INS, 532 F.2d 268 (2nd Cir. 1976). The amendment to section 212 (h) does not satisfy these equal protection criteria since someone who has lived in this country for the same number of years as Mrs. Ramtulla, committed the same offense, and served the same sentence, but had lived here as an undocumented or illegal immigrant, would be eligible for relief from deportation - - - unlike Mrs. Ramtulla.

The distinctions between legal and illegal aliens created by this statute are not rational, nor do they rest upon any ground of difference having a fair and substantial relation to the object of the regulation. *Yeung v. INS*, 76 F.3d 337, 338. As the Ninth Circuit has noted, there are very logical reasons for treating lawful permanent residents **better** than illegal immigrants. *Castillo Felix v. INS*, 601 F .2d 466-467 (9th Cir. 1979) (holding that only lawful permanent residents could qualify for waiver under statute requiring 7 years of lawful residence because permanent aliens had established closer ties to the United States). However, in this case Congress has intentionally created a distinction that treats lawful permanent residents **worse** than illegal immigrants. It has created a distinction that places an incentive on being an illegal immigrant rather than a legal immigrant, and punishes those with closer ties to the United States. As the Ninth Circuit noted in *Tapia-Acuna v. INS*, it is irrational to punish aliens more heavily simply because they have closer ties to the United States. 640 F.2d 223, 225 (9th Cir. 1981), superceded on other grounds by statute as recognized in *United States v. Estrada-Torres*, 179 F.3d 776, 778 (9th Cir. 1999) (quoting *Francis v. INS*, 532 F.2d 268,273 (2nd Cir. 1976) ("[N]o purpose would be served by giving less consideration to the alien 'whose ties to this country are so strong that he has never departed from after his initial entry 'than to the alien who may leave and return from time to time.").

Moreover, Section 212 (h) creates a distinction that rewards those illegal aliens who are necessarily guilty of at least two crimes, illegal entry and the aggravated felony, by treating them better than individuals guilty of only of the one aggravated felony. The fact that individuals may be convicted of exactly the same aggravated felony, yet subject to different consequences distinguishes this case from those in which aliens have unsuccessfully argued that the distinction between similar crimes violates equal protection. See, e.g., *Rodriguez v. INS*, 9 F.3d 408 (5th Cir. 1993). (rejecting claim that conviction of possession of sawed off shotgun should be treated no worse than conviction of illegal firearms trafficking). Congress may certainly select those crimes that it views as particularly deplorable and expedite the removal of those convicted of such crimes. In this case, however, the statutory scheme rewards an extra crime rather than punishing particularly disfavored crimes. The denial of discretionary consideration of plaintiff's stay of deportation petition violated equal protection as such consideration was available only to illegal aliens who committed aggravated felonies and not also to legal aliens who committed the same offenses.

Section 212 (h) as it is written violates equal protection. When, as is the case here, Congress has not clearly expressed its intentions regarding a statute, the Court must traditionally begin with the presumption that Congress intended the plain meaning of its language. However, given the irrational nature of legislation that unexplainedly discriminates against legal aliens while favoring illegal ones, the inevitable conclusion is that perhaps Congress intended something different, and created the distinction by accident. As one Court noted, "In light of the generally constrictive approach in the IIRIRA towards illegal immigrants, it appears likely to the Court that Congress intended to preclude § 212 (h) relief for all immigrants, legal or illegal.

Young Hak Song v. INS, 82 F. Supp. 2d, 1121, 1134 (C.D. Cal. 2000). Like the *Young Hak Song* court, this Court should conclude that, because Congress did not express that intention, the statute should be read as written and be found to violate Appellant's right to equal protection. *Id.*

III. DISPARATE TREATMENT BETWEEN PERMANENT RESIDENTS AND ILLEGAL ALIENS UNDER INA 212 (h) IS NOT RATIONAL OR JUSTIFIABLE.

In the matter of Terri-Ann T. Ramtulla, the INS has historically conceded that a difference in treatment of similarly situated aliens can only exist when there is a rational basis for the distinction in treatment. Government attorneys, attempting to articulate a rational basis for differences in treatment mandated by Section 212 (h), have historically postulated justifications that were never alluded to or adopted by Congress. Although permitted under the rational basis review standard, this strategy amounts to little more than what Justices Brennan and Marshall described as "presuming purpose from result and reducing analysis to tautology." *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980) (Brennan, J. and Marshall, J., dissenting). Nevertheless, further analysis clearly reveals that none of the of the historically proffered purposes of Section 212(h) constitutes a rational basis for the difference in treatment of lawful permanent residents and illegal aliens.

A. Precedent Justifying Disparate Treatment Based On Nature of Offense Does Not Justify Discrimination Based Upon Immigrant Classifications.

The government has often cited the *Matter of LaGuerre*, 164 F. 3d. 1035 (7th Cir. 1998) to point out that there is a rational basis for a difference in treatment of aliens. However, *LaGuerre* is distinguishable from this case on the facts alone.

In the *Matter of LaGuerre*, the difference in treatment between aliens was based on the nature of their conviction. According to the Seventh Circuit's decision, it is the aliens convicted of a drug offense who are not eligible for 212 (c) waiver because of a drug related conviction under Section 440 (d). This distinction indeed seems rational because Congress viewed drug offenses as worthy of more severe punishment and limitation of relief from deportation. In the case at bar, the relief sought under Section 212 (h) is based upon the status of the alien, rather than Section 212 (c) relief, which is based on the nature of the offense. Unlike the respondent in *LaGuerre*, Mrs. Ramtulla has been irrationally denied consideration for relief from deportation solely because of her status as a Lawful Permanent Resident. Illegal aliens who had committed the same offenses as the Appellant may, however, be considered for such relief. This disparate treatment clearly violates her rights to equal protection.

B. Section 212 (h) of the INA Does Not Rationally Achieve Government Policy To Expeditiously Remove Aliens Who Have Violated Laws

The government has also often attempted to defend the discrimination against lawful permanent residents by reference to the asserted policy that aliens who enter and remain in the United States in violation of the immigration

laws should be expeditiously removed. Section 212(h), however, rewards, rather than punishes, violations of the immigration laws. Thus the alien *In Matter of Michel*, Int. Dec. 3335 (BIA 1998) (en banc) who entered and stayed in the United States contrary to the immigration laws obtained a waiver under Section 212(h), yet a long term resident such as Mrs. Ramtulla is now barred from such relief. In fact, 212 (h) actually rewards those who have committed two crimes (aggravated felony and illegal entry), while penalizing legal permanent residents whose ties to this country are stronger than the favored illegal aliens, and who have committed only the one aggravated felony that is driving their deportation. Section 212 (h) therefore produces a distinction that simply bears no rational relationship to any legitimate policy underlying the Act, and is in reality counterproductive to any alleged objective of punishing those most culpable of violating this nation's laws.

C. Justification of Section 212(h) Disparate Treatment as Policy Allowing Illegal Immigrants One Chance To Prove They Should Be Admitted Is Not Rational Basis for Disparate Treatment.

The government has, in similar cases, also proffered that there is a rational basis for the distinctions mandated in Section 212 (h) by arguing that Congress decided to allow illegal immigrants one chance to prove to the Attorney General that they should be admitted. By contrast, this argument maintains that legal immigrants convicted of an aggravated felony have had their chance and abused it. *Castillo-Felix v. INS*, 601 F.2d 459, 470 (9th Cir. 1979) (Tagasuki, J. dissenting, stating that a lawful resident, "enjoys greater rights than a nonimmigrant alien and assumes commensurate responsibilities and duties.") In support of this argument, based upon the dissenting opinion, the government has implied that one of these duties is a special duty to follow the law, making legal

aliens more amenable to deportation when they do not. This proposed justification also fails the rational means and ends test. As one Court noted concerning Section 212 (h):

> Although it is certainly true that additional duties can be imposed on legal residents, it does not make sense that one of these duties is a particular responsibility to follow the law. All individuals present in the United States have a duty to follow the law, and nothing about the position of legal residents makes it more important that they follow the law than any other individual."

Young Hak Song v. INS, 82 F. Supp. 2d 1121, 1136 (C.D. Cal. 2000)

D. Section 212(H) Is Not A Rational First Step Toward Goal Of Removing Aliens Who Commit Serious Crimes.

Contrary to the Eleventh Circuit's recent holding in *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001), Petitioner maintains that this latter hypothesis regarding possible Congressional intent, even if considered a "first step toward the goal of quickly removing aliens who commit serious crimes," does not provide a rational basis for distinctions between the two classes of aliens that would not violate the Equal Protection Clause. (Finding that the statutory scheme did not violate equal protection guarantees, inasmuch as it was a rational first step toward the goal of quickly removing aliens who commit serious crimes, and it was arguably proper to hold legal permanent residents to a higher standard given the rights and privileges they enjoy).

While Congress may certainly take a step-by-step approach to the resolution of problems, the steps taken must themselves pass constitutional muster and not create

unconstitutional distinctions, which is precisely what Section 212(h) does. See *Cruz v. Reno*, 6 F. Supp.2d 744 at 57 (N.D. Ill. 1998), rev'd on other grounds by *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998) ("It is undeniable that Congress may address a problem 'one step at a time.' However, each step that classifies groups of people and affords them different protection under the law must have a rational basis.") Because its provisions create unconstitutional distinctions between the two classes of aliens, Section 212 (h), even if considered a "first step toward the goal of quickly removing aliens who commit serious crimes," does not provide a rational basis for distinctions between the two classes of aliens that would not violate the Equal Protection Clause. Congress could not, for example, choose to address the problem of organized crime on an incremental basis by enacting a version of 18 U.S.C. 1961 et seq. limited to immigrants of Italian ancestry, based upon a view that such individuals accounted for the bulk of the problems posed by organized crime.

Petitioner understands that there is a strong presumption in favor of the validity of the statute and recognizes the power of the Government's political departments to expel or exclude aliens. As the Supreme Court noted in *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), "Limits and classifications as to who shall be admitted are traditional and necessary elements of legislation in this area. In the inevitable process of 'line drawing' Congress has determined that certain classes of aliens are more likely to satisfy national objectives without undue cost and it has granted preferential status only to those aliens." However, as the Ninth Circuit noted in *Runnett v. Schultz*, 901 F.2d 782,787 (9th Cir. 1990), the court must uphold a distinction drawn by Congress in the immigration realm so long as there is a **rational basis** for the Congressional decision whether the rational basis is articulated by Congress or not. (Emphasis added). Furthermore, Congressional decisions

on immigration are not free from all judicial review, and such decisions can be invalidated if there is no rational basis whatsoever for the distinction made. *Yeung v. INS*, 76 F. 3d 337,339 (11th Cir. 1996); *Raya-Ledesma v. INS*, 55 F.3d 418, 420 (9th Cir. 1995).

CONCLUSION

The question of whether Section 212 (h) of the INA violates Appellant's rights under the Equal Protection Clause is a substantial constitutional issue which the Fourth Circuit Court of Appeals has jurisdiction to review. The Fourth Circuit's dismissal of this matter should therefore be reversed and this case remanded to the Fourth Circuit for review of the constitutional claim.

Respectfully Submitted,

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PUBLISHED
UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

TERRI-ANN RAMTULLA,

Petitioner,

v. No. 01-1958

JOHN ASHCROFT, Attorney General;
U.S. IMMIGRATION & NATURALIZATION
SERVICE,

Respondents.

On Petition for Review of an Order
of the Board of Immigration Appeals.
(A73-676-361)

Argued: June 3, 2002
Decided: August 22, 2002
[Entered: August 22, 2002]

Before MICHAEL and GREGORY, Circuit Judges, and
Bobby R. BALDOCK, Senior Circuit Judge of the
United States Court of Appeals for the Tenth Circuit,
sitting by designation.

Dismissed by published per curiam opinion.

COUNSEL

ARGUED: Larry Lynn Lew, LAW OFFICE OF J. W. NESARI, L.L.C., Arlington, Virginia, for Petitioner. Alison Ruth Drucker, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents. **ON BRIEF:** Robert D. McCallum, Jr., Assistant Attorney General, Donald E. Keener, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

OPINION

PER CURIAM:

Petitioner seeks review of a deportation decision by the Board of Immigration Appeals, arguing that section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), violates the equal protection guarantee of the Fifth Amendment's Due Process Clause because it allows discretionary relief from removal for illegal immigrants convicted of aggravated felonies while it denies the same relief to lawful permanent resident aliens convicted of the same offenses. Because we lack jurisdiction to hear this appeal, we dismiss the petition for review.

I.

Terri-Ann Ramtulla, a native and citizen of Jamaica, entered the United States in 1992 as a non-immigrant visitor and became a lawful permanent resident in 1995. She is married to a United States citizen, and her two children are United States citizens. In 1997, Ramtulla pled guilty to violating Va. Code Ann. § 18.2-103, prohibiting concealment of merchandise valued at $200 or more. She was sentenced to two years imprisonment, all suspended, and two years probation.

In 1999, the INS issued a notice to appear, charging Ramtulla with being removable under 8 U.S.C.A. § 1227(a)(2)(A)(i), (iii), for conviction of a crime of moral turpitude and an aggravated felony. Ramtulla sought a § 212(h) waiver, 8 U.S.C.A. § 1182(h).[1] The immigration judge (IJ) held that Ramtulla was ineligible for such relief as a lawful permanent resident guilty of an aggravated felony. The Board of Immigration Appeals upheld the IJ. Ramtulla petitions this court for review of the Board's decision.

II.

We conclude that we lack jurisdiction to review the question on direct review. Under 8 U.S.C. § 1252(a)(2)(C), we have no jurisdiction to review a final order of removal of an alien removable for having committed an aggravated felony. Under this provision, we have jurisdiction only to review factual determinations that trigger the jurisdiction-stripping provision, such as whether Ramtulla was an alien and whether she has been convicted of an aggravated felony. *Calcano-Martinez v. INS*, 533 U.S. 348, 350, n.2 (2001); *Lewis v. INS*, 194 F.3d 539, 542 (4th Cir. 1999).[2] Ramtulla concedes that she is an alien living in the United States as a lawful permanent resident. The record establishes that she was convicted of concealment of merchandise and sentenced to two years imprisonment, all suspended, and

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[1] Section 212(h) provides that the Attorney General has the discretion to waive certain grounds of inadmissibility and therefore grant relief from deportation "in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . ." 8 U.S.C. § 1182(h)(1)(B).

[2] The jurisdiction-stripping provisions of the statute do not preclude petitioner from pursuing habeas relief. *See INS v. St. Cyr*, 533 U.S. 289 (2001).

subject to probation for a period of two years.[3] A theft or burglary offense with a term of imprisonment of at least one year is an aggravated felony. 8 U.S.C.A. § 1101(a)(43)(G).

Thus, this court has no jurisdiction to review the equal protection issue raised in Ramtulla's brief. Our conclusion is unaffected by Ramtulla's argument that we have jurisdiction under § 1252(a)(2)(C) to review substantial constitutional challenges. Even assuming, without deciding, that our jurisdiction under § 1252(a)(2)(C) includes review of substantial constitutional challenges, *see Calcano-Martinez*, 533 U.S. at 350, n.2, this claim does not present such a substantial issue. *See Lukowski v. INS*, 279 F.3d 644, 647-48 (8th Cir. 2002) (holding a similar equal protection argument lacks merit); *Moore v. Ashcroft*, 251 F.3d 919, 924-26 (11th Cir. 2001) (same); *Lara-Ruiz v. INS*, 241 F.3d 934, 946-48 (7th Cir. 2001) (same).

III.

Accordingly, the petition is dismissed for lack of jurisdiction.

DISMISSED

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[3] "Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration . . . ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B).

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-676-361 Baltimore Date: June 15, 2001

In re: RAMTULLA, TERRI-ANN TAMARA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: NESARI, JOE

ON BEHALF OF SERVICE: DOMINGUEZ, LINDA A.

ORDER:

PER CURIAM: The Board affirms, without opinion, the results of the decision below. The decision is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

\s\ _____
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Baltimore, Maryland

September 28, 2000

File No.: A 73 676 361
In the Matter of
TERRI-ANN TAMARA RAMTULLA,
Respondent

IN REMOVAL PROCEEDINGS

CHARGES: Section 237 (a)(2)(A)(i) of the Immigration and Nationality Act: convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed; Section 237(a)(2)(A)(iii):Convicted of an aggravated felony as defined in Section 101(a)(43)(G): To wit, a theft offense for which a term of imprisonment is at least one year.

APPLICATIONS: Motion to terminate, and in the alternative adjustment of status with a 212(h) waiver.

ON BEHALF OF RESPONDENT:

Joe W. Nesari, Esquire
4105 North Fairfax Drive, Suite 104
Arlington, Virginia 22203

ON BEHALF OF SERVICE:

Linda Dominguez
Assistant District Counsel
Baltimore INS
Baltimore, Maryland

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native citizen of Jamaica, who was admitted to the United States at Miami, Florida on or about December 14, 1992 as a non-immigrant visitor. On or about August 22, 1995, her status was adjusted to that of a lawful permanent resident under INS Section 245.

On or about June 23, 1997, she was convicted upon a plea of guilty in the Circuit Court of Fairfax County, Virginia for the offense of concealment of merchandise in violation of Virginia Code Section 18.2-103. For this offense, she was sentenced to a term of imprisonment of two years. This sentence was suspended, and she was placed on two years supervised probation. See Exhibit 4. On or about September 7, 1999, she was served with a Notice to Appear by the Immigration and Naturalization Service charging her with being removable as set forth above. See Exhibit 1.

At a master calendar proceeding, she admitted the factual allegations in the Notice to Appear but denied removability as charged. More specifically, she denied that she had been convicted of a crime involving moral turpitude and an aggravated felony. She argued that the proceedings should be terminated.

In the alternative, she argued that even if she had been convicted of an aggravated felony, she is eligible to adjust her status in the United States in conjunction with a 212(h) waiver. She is married to a citizen of the United

States. Jamaica has been designated by the Court as the country of removal should that become necessary. The parties have submitted briefs on the issues of whether the respondent has been convicted of a crime involving moral turpitude and aggravated felony and whether if she is convicted of an aggravated felony she can adjust her status in conjunction with a 212(h) waiver.

Respondent's motion to terminate these proceedings, arguing that she has not been convicted of a crime of moral turpitude and an aggravated felony, have been marked into evidence as exhibit 6. Respondent's brief on the issue of her eligibility to adjust her status has been marked into evidence as exhibit 8. The Service's brief has been marked into evidence as Exhibit 9. The respondent's response brief has been marked into evidence as group Exhibit 10. The Court has thoroughly familiarized itself with both the respondent's and the Government's briefs and the issues contained therein.

POSITION OF THE RESPONDENT

The Respondent argues that she has not been convicted of a crime involving moral turpitude. She firstly argues that she pled guilty to the offense of concealment of merchandise solely on the advice of her attorney at the time. Her plea was not an admission of guilt, but rather a strategy to avoid incarceration.

She also argues that the statute under which she was convicted, Virginia Code Section 18.2-103, is a divisible statute. Not all of the offenses contained within this particular statute are crimes of moral turpitude. The Circuit Court failed to mention in its conviction record the particular section of the statute under which the respondent was convicted.

With reference to the charge that she has been convicted of an aggravated felony, the respondent argues that it is the responsibility of the INS to show that a certain dollar amount threshold has been reached in order to classify her crime as a felony.

Moreover, a Federal standard must be applied when trying to decide whether a state offense fits within the aggravated felony definition. The fact that Congress has not directed the Court to employ a particular Federal statute in construing the meaning of theft, weighs against the presumption that the potential consequences for the respondent are so severe, it is incumbent upon this Court to apply that approach which least infringes upon the availability of relief from removal.

Finally, the respondent argues that even if this Court were to find that she has been convicted of an aggravated felony, she is still entitled to apply for adjustment status along with a 212(h) waiver based on her marriage to a United States citizen.

The IIRIEA amendment to 212(h) violates the equal protection laws, because it disallows a waiver for aggravated felons who are lawful permanent residents while allowing a waiver for aggravated felons who are not lawful residents.

POSITION OF THE INS

The INS argues that the respondent has been convicted of a crime involving moral turpitude. She was charged with "willfully concealing or taking possession of property in excess of $200." See Exhibit 4. She was convicted of this particular offense. This is conduct that is morally reprehensible and thus a crime involving moral turpitude.

The INS further argues that the respondent's criminal conviction meets the definition of aggravated felony as defined in INA Section 101(a)(43)(G).

Finally, the INS argues that under the plain language of INA Section 212(h), the respondent as a lawful permanent resident is not eligible for a 212(h) waiver because she has been convicted of a crime involving moral turpitude.

ANALYSIS

Crime Involving Moral Turpitude

Based on the totality of evidence and for the reasons set forth below, the Court finds that the respondent has been convicted of a crime involving moral turpitude.

As an initial matter, this Court finds that it is inappropriate for it to go behind the fact that the respondent pled guilty to concealment of merchandise in violation of Virginia Code Section 18.2-103 and examine the motives for the plea. The fact remains that on June 23, 1997, the respondent was convicted upon a plea of guilty of the aforementioned offense.

Secondly, this Court finds that respondent's conviction under Virginia Code Section 18.2-103 is a crime involving moral turpitude, regardless of the fact that the section under which she was convicted was not specified by the Circuit Court.

Section 18.2-103 of the Code of Virginia states that a person is guilty of concealment of merchandise if she

> ... without authority, with the intention of converting goods or merchandise to his or another's use without having paid the full purchase price thereof, or of defrauding the owner of the value of the goods or merchandise, (1) willfully conceals or takes possession of the goods or merchandise of any store or other mercantile establishment, or (2) alters the price tag or other price marking on such goods or merchandise, or transfers the goods from one container to another, or (3) counsels, assists, aids, or abets another in the performance of any of the above acts when the value of the goods or merchandise is less than $200 shall be guilty of petty larceny and when the value of the goods or merchandise involved in the offense is $200 or more shall be guilty of grand larceny. Willful concealment of goods or merchandise of any store or other mercantile establishment while still on the premises thereof shall be prima facie evidence of the intent to convert and defraud the owner thereof out of the goods or merchandise.

This Court disagrees with the respondent's assessment that certain of the subsections contained within 18.2-103 of the Virginia Code constitutes crimes involving moral turpitude, while others do not.

The Court notes that all three of the aforementioned subsections of 18.2-103 of the Virginia Code refers to one's intention of "converting goods or merchandise to his or another's use without having paid the full purchase price thereof or of defrauding the owner of the value of the goods or merchandise." If the value of the goods or merchandise involved is less than $200 shall be guilty of petty larceny. If

the value of the goods or merchandise involved in the offense is $200 or more shall be guilty of grand larceny. See Virginia Code 18.2-103.

It is well settled that convictions for both petty larceny and grand larceny constitute crimes involving moral turpitude. See in the Matter of R-, 1 I&N 541 (BIA 1943). See also Mater of Westman, 17 I&N 50 (BIA 1979).

Thus, regardless of which section the respondent was convicted under and regardless of whether the value of the goods involved was less than or more than $200, she has been convicted of a crime involving moral turpitude.

That having been said, this Court does find that the conviction record is clear in this case with regard to the respondent's conviction.

This Court notes that the indictment in this case charges that the respondent "did without authority, with the intention of converting goods or merchandise to her or another's use without having paid the full purchase price thereof, willfully concealed or took possession of merchandise... valued in excess of $200. See indictment dated March 17, 1997, Exhibit 4. This is the exact language Virginia Code Section 18.2-103(1).

The conviction record entered on April 3, 1997, state "The defendant was arraigned upon the indictment, and the defendant in person and in writing signed by her entered plea of guilty". See Exhibit 2. Thus it is obvious to this Court that the respondent pled guilty to Virginia Code 18.2-103(1) of the Virginia Code, and the amount of the goods involved was in excess of $200. She was arraigned on this indictment and this is what she pled guilty to. Under Virginia Code Section 18.2-103, this constitutes a conviction for grand larceny. The language of the statute is clear.

To further bolster that she has been convicted of a grand larceny offense is the fact that she was sentenced to a term of imprisonment of two years. Under Virginia statute, petty larceny is to be punished as a Class 1 misdemeanor. See Virginia Code section 18.2-96. Maximum punishment for misdemeanor larceny is not more than 12 months for incarceration. See Virginia Code section 18.2-104. Virginia Code Section 18.295 defines grand larceny inter alia as "the committing of a simple larceny, not from the person of another of goods ... of the value of $200 or more." The potential sentence is one to 20 years. Thus it is in this Court's opinion that the respondent has been convicted of a grand larceny offense and the respondent has been convicted of a crime involving moral turpitude.

AGGRAVATED FELONY

This Court further finds that the respondent has been convicted of an aggravated felony. The language of INA Section 101(a)(4)3(G) is straight forward. A person who has been convicted of a theft offense for which the term of imprisonment is at least one year has been convicted of an aggravated felony. As noted above, this Court finds that the respondent has been convicted of a grand larceny offense under Virginia Code section 18.2-103. For this offense she was sentenced to a term of imprisonment of two years.

The respondent argues that this Court must look to a Federal definition of theft to determine whether the respondent's conviction of concealment of merchandise can be considered an aggravated felony. However, it has provided no such definition to this Court such as would preclude the respondent's conviction for being considered an aggravated felony. As stated above, the language of Section 101(a)(43)(G) of the Act is clear. The respondent was convicted of concealment of merchandise, which is a theft

offense. As noted above, the Court finds that she has been convicted of a grand larceny offense for which the amount was $200 or more. This Court must find that the respondent has been convicted of an aggravated felony under 101(a)(43)(G) of the Act.

ELIGIBILITY FOR 212(h) WAIVER

Having found that the respondent has been convicted of an aggravated felony, this Court further find that she is ineligible to apply for a 212(h) waiver in conjunction with her application for an adjustment of status.

The language of INA Section 212(h) is clear. "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if [inter alia] since the date of such admission the alien was convicted of an aggravated felony.

In this case, the respondent entered the United States in 1992 as a visitor. She adjusted her status on August 22, 1995, to that of a lawful permanent resident of this country. She was convicted of the aforementioned offense on June 23, 1997. She is ineligible to apply for a 212(h) waiver.

The respondent argues that this is a violation of the equal protection clause of the Constitution in that nonlawful permanent residents are eligible to apply for a 212(h) waiver while lawful permanent residents are not eligible.

This Court has no authority to make such rulings on the constitutionality of statutes.

Thus it must decide based on the plain language of the statute. This Court must therefore pretermit the respondent's application for adjustment of status in conjunction with a 212(h) waiver.

VOLUNTARY DEPARTURE

Because this Court has found that the respondent has been convicted of an aggravated felony, it must further find that under INA section 101(f)(8) she is not eligible for the privilege of voluntary departure. This Court further finds that the respondent does not appear to be eligible for any other relief in the United States. The respondent, through her counsel, indeed has made no other application for relief. Based on the totality of the evidence as presented in this case, this Court has no choice but to order that the respondent be removed and deported to Jamaica on the charges contained in the Notice to Appear.

Accordingly, the following orders are entered:

ORDER

IT IS ORDERED that the respondent's motion to terminate these proceedings be denied.

IT IS FURTHER ORDERED that the respondent's application to adjust her status in conjunction with a 212(h) waiver be pretermitted.

IT IS FURTHER ORDERED that the respondent be removed and deported from the United States to Jamaica on the charges contained in the Notice to Appear.

/s/ Jill H. Dufresne
JILL H. DUFRESNE
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: October 28, 2002

No. 01-1958
A73-676-361

TERRI-ANN RAMTULLA,
Petitioner,

v.

JOHN ASHCORFT, Attorney General;
U.S. IMMIGRATION &
NATURALIZATION SERVICE,
Respondents.

ORDER

Petitioner has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court
/s/ Patricia S. Connor
CLERK